STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA JAMES and GEORGE JAMES, JR.,	UNPUBLISHED August 1, 2006
Plaintiffs-Appellants,	
v	No. 259813 Wayne Circuit Court
COSTCO WHOLESALE CORP.,	LC No. 02-209397-NO
Defendant-Appellee.	

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

SAAD, J. (*dissenting).*

I respectfully dissent. The majority concludes that "common sense" and "common experience" suggest that, in April 1999, whoever pushed the carts at Costco that injured plaintiff must have been a Costco employee. Were this simply a matter of casual discussion, there is surface appeal to this position. However, proof in a court of law requires more.

Indeed, I dissent because I believe that "common sense" suggests that, if someone is injured at a store, the injured person would immediately identify the person who engaged in the misconduct—the tortfeasor. Here, plaintiff says she told the manager about the incident, but she has produced no evidence about the alleged tortfeasor other than her recollection that he was a young, white male. And, to make matters worse, plaintiff has not identified anyone who may have witnessed the incident.

Neither plaintiff nor her lawyer made any effort through discovery to identify the person who pushed the carts. Clearly, this identification could have been accomplished at the time of the injury or shortly thereafter. Further, the first question in discovery should have been to identify the person or persons who pushed carts on April 2, 1999. This was never done. Now, as we write this opinion in July of 2006, "common sense" suggests that any attempt to identify the cart pusher and, thus, defend this case (which may go to trial almost 8 years after the event), is substantially undermined. Because of plaintiff's failure to identify the cart pusher for almost 7 years, Costco is now left with the virtually impossible task of defending against this claim, which, as far as Costco is concerned, may never have happened, or, may not have happened as plaintiff claims.

Indeed, given the passage of time coupled with plaintiff's failure to conduct the most elementary and basic discovery, Costco may never be able to conduct a defense. And, to suggest that Costco should have made the identification for plaintiff is to misplace the burden of proof

and would run contrary to the most basic tenets of our jurisprudence. The majority opinion now states that, many years after the event, Costco must go to trial and defend against an event in which the only witness is plaintiff herself who never identified the tortfeasor nor ever made an effort to do so. This is simply unfair to any defendant placed in this or a similar situation. One of the first rules of tort law is to identify who caused the harm. This is the law and is common sense as well.

/s/ Henry William Saad